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No. 82-312

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1982

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al.,
*Petitioners,*

v.

SEALY, INCORPORATED, et al.,
*Respondents.*

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondent Sealy's Brief in Opposition demonstrates the importance of not allowing the decision below to stand uncorrected. Respondent's Brief, by going far beyond the reasoning of the decision below, tacitly concedes that the decision cannot be justified within its four corners.[1]

Respondent's Brief in Opposition argues eloquently for review by this Court: if Respondent's arguments are correct, they should be adopted by this Court; if Respondent's arguments are incorrect, they should be rejected by this Court. In either event the legal ambiguities which have already produced 22 years of litigation would at long last be eliminated.

[1]Of the 22 cases cited by Respondent, only 4 were cited by the Court of Appeals; of the 13 cases cited by the Court of Appeals, only 4 are cited by Respondent. (Brief of Respondent In Opposition, ii-iii; Appendix to the Petition herein, A1-A12; *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 669 F.2d 490 (7th Cir. 1982).

## I. The Court Should Resolve The Questions Left Open By *Sealy*, *Topco* and *Sylvania*

The question presented is not whether the district court had "discretion" in shaping equitable relief, because no court has discretion to condone a *per se* violation of Section 1 of the Sherman Act. 15 U.S.C. § 1 The question presented is whether Sealy's absolutely exclusive manufacturing territories constitute such a violation. The four arguments advanced by Respondent for denying the wr.. raise important questions of substantive antitrust law which merit resolution by this Court.

1. Respondent says that the characterization of Sealy's restraints as horizontal is "merely argumentative" (BRO 7-8),[2] but the district court found that they were "the products of a horizontal conspiracy (in this instance a conspiracy between Sealy and others of its licensees)." (A129)[3] Whether those restraints were subsequently sanitized—by Sealy's relatively recent election of a non-licensee board of directors—raises an important question under the antitrust laws: To what extent is the origin or source of the restraint determinative of its classification as vertical or horizontal? See *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See also item 4 below, where the "dual distributor" matter is addressed.

2. Sealy cites the Court's decisions in *Sealy* and *Topco* as reasons for denying the writ, but exactly the opposite is true. In *Sealy* the Court did not distinguish between Sealy's exclusive sales territories and its exclusive manufacturing territories, presumably because the former rendered the latter moot at the time. *United States* v. *Sealy Inc.*, 388 U.S. 350 (1967). The mattress business is a local business and no rational mattress company would want to manufacture mattresses in an area where it could not sell those mattresses. After the Court's *Sealy* decision, however, exclusive

[2] "BRO" references are to the Brief Of Respondents In Opposition.
[3] "A" references are to the Appendix to the Petition herein.

manufacturing territories became terribly important to Sealy, because a Sealy licensee which could manufacture Sealy mattresses wherever it wanted could also sell Sealy mattresses wherever it wanted. That is why Sealy's exclusive manufacturing territories were retained as a "means of getting around the Supreme Court ruling in such a way as to be able to retain the territorialization." Whether Sealy's exclusive manufacturing territories are unlawful *per se* is an important question which has never been answered by the Court.

Sealy's reliance on the Court's *Topco* decisions also supports granting the writ. In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) (*Topco I*), this Court held, in the strongest language possible, that a horizontal system which prohibited Topco licensees from having stores outside their respective territories constituted a *per se* violation of the Sherman Act. But Sealy licensees are still absolutely prohibited from establishing Sealy plants outside their respective territories, and if Ohio wants to sell Sealy mattresses in, say, California or Oregon, it must manufacture them in Texas. If the Court's decision in *United States* v. *Topco Associates, Inc.*, 414 U.S. 801 (1973) (*Topco II*) silently overruled *Topco I*, as Sealy argues (BRO 9 and 10), then the Court should grant the writ and make explicit that which Sealy claims was implicit in *Topco II*.

3. Sealy's third argument also supports granting the writ, because Sealy contends that there is a "serious question" (BRO 11) whether *Sealy* and *Topco I* can be reconciled with *Sylvania* and *Broadcast Music, Inc.*, v. *Columbia Broadcasting System, Inc.* 441 U.S. 1 (1979). This "serious question" has been the subject of numerous law review articles,[4] and this case presents an

[4]Altschuler, *Sylvania, Vertical Restraints, and Dual Distribution*, 25 Antitrust Bull. 1 (1980); Bondurant, *Legal Risks Posed By Sherman Act Section 1; Favoritism Of Owner Outlets And Strategic Pricing*, 48 ABA Antitrust L.J. 1815 (1979); and Stewart and Roberts, *Viability Of The Antitrust Per Se Illegality Rule; Schwinn Down, How Many To Go?*, 58 Wash. U.L.Q. 727 (1980).

"all-fours" vehicle for clarifying the *per se* doctrine in that important area of antitrust law.

4. Sealy's fourth argument—"dual distributor"—is actually a variation of Sealy's first argument, because it calls into question the standards to be applied in deciding whether a given restraint is vertical or horizontal. Sealy apparently contends that any restraint which contains a vertical element must be treated as vertical, even though it also contains substantial horizontal elements, and Sealy cites five decisions from four circuits in support of its contention. (BRO 12) Sealy does not, however, cite other decisions which reach a contrary conclusion,[3] and Sealy concedes that "the opinion below did not expressly address this agrument . . . ." (BRO 12) Sealy's argument should now be addressed by this Court, because it, like Sealy's other arguments, presents an important question under the antitrust laws which has not been, but should be, answered by the Court.

## II. The Court Should Resolve The Substantive Constitutional Question Which Has Never Been Addressed By The Court

The second clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U.S.C.A. Const. Amend. 7) The remittitur device can be reconciled with the Seventh Amendment only on the ground that it excises an "excrescence" from the jury's ver-

[3] *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975); *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.*, 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973); Interphoto Corp. v. *Minolta Corp.*, 417 F.2d 621 (2d Cir. 1969), *aff'g per curiam* 295 F.Supp. 711 (S.D.N.Y.); *Pitchford* v. *Pepi Inc.*, 531 F.2d 92 (3d Cir. 1976), *on remand*, 435 F.Supp. 685 (W.D. Pa. 1977).

dict. *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). In this case it has been established that the remitted $10.2 million was not an "excrescence." *Ohio Sealy, Inc.* v. *Sealy, Inc.*, 585 F.2d 821, 843 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979). It follows, therefore, that Ohio has been deprived of its right to trial by jury under the Seventh Amendment.

Sealy seeks to defeat the logic of the foregoing constitutional theorem by referring to "a settled line of decisions of this Court stretching back to 1889, most recently affirmed in *Donovan* v. *Penn Shipping Co. Inc.*, 429 U.S. 648 (1977)." (BRO 12) But *Donovan* did not address any substantive constitutional issue; it merely established a procedural rule that a plaintiff "may not appeal" (429 U.S. at 650) from a remittitur order without first enduring a second trial. In this case, however, Petitioner is not appealing from the remittitur order. Rather, Petitioner is appealing from the district court's refusal to exercise its power under Rule 54(b) to correct an established error and restore to the jury's verdict $10.2 million which was not an "excrescence."

Nor does *Lewis* v. *Wilson*, 151 U.S. 551 (1894) support Respondent's argument, because in that case the trial court required *both parties*, to accept the reduced judgment; if both parties had not done so, the "excessive" verdict would have stood in the trial court, subject only to being reversed on appeal. 151 U.S. at 551-552. In other words, the plaintiff in *Lewis* v. *Wilson*, by joining with the defendant and accepting the remittitur, truly escaped "the risk of losing the judgment he had already obtained." (BRO 13) In the instant case, however, Petitioner was exposed to that very risk until October, 1978, when the Court of Appeals held that the jury verdict had been "unnecessarily halved." *Ohio-Sealy, Inc.* v. *Sealy, Inc.*, 585 F.2d at 843.

*Dimick* v. *Schiedt, supra*, establishes that the Seventh Amendment has been violated in this case, and there is no practical or procedural reason why that violation should not be corrected. By

so acting the Court can enforce the will of the Founding Fathers and thus fulfill its oath to uph l the Constitution of the United States of America.

### III. The Court Should Make It Clear That Rule 54(c) Is Not Discretionary

The Court of Appeals did not even mention Rule 15(d), Fed. R. Civ. P., let alone base its decision on that Rule. Nevertheless Respondent Sealy argues that Petitioner's criticism of the decision below is **"Frivolous"** on the ground that Rule 15(d) gives the district court "discretion" to deny leave to file a supplemental pleading. (BRO 14)

In support of its gloss on the decision below, Respondent misquotes Rule 54(c), which provides as follows: "... *every final judgment shall grant* the relief to which the party in whose favor it is entered is entitled, *even if the party has not demanded such relief in his pleadings.*" The italicized words are those omitted, without ellipses, from Respondent Sealy's purported quotation. It is obvious from a reading of the actual language of Rule 54(c) that the district court's failure to grant complete relief cannot be justified as an exercise of discretion under Rule 15(d).

Sealy's "no conceivable prejudice" argument (BRO 14) is equally misleading, because the district court in the second action has already ruled that the damages which Ohio seeks are barred by the doctrine of *res judicata. Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 90 F.R.D. 11 (N.D. Ill. 1980) (A226)

The inadequacy of the decision below is demonstrated by Respondent Sealy's strained efforts to justify that decision on grounds which find no basis whatsoever in the decision itself.

## CONCLUSION

The important questions raised by the Petition for Certiorari and emphasized by Respondent Sealy's Brief in Opposition were not even addressed, let alone answered, in the decision below. Neither the parties, nor the courts, nor the public interest will be served if those important questions remain in limbo during additional years of costly litigation.

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